84-1175

No. _____

Office-Supreme Court, U.S.
FILED
JAN 22 1985
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

David Nelson,

Petitioner

v.

The State of Texas

Petition for a Writ of Certiorari to the Court of Criminal Appeals Austin, Texas

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R. L. Whitehead, Jr.
Whitehead-Beckworth
505 North Green Street
Longview, Texas 75601
(214) 758-0561

Attorney for Petitioner

QUESTION PRESENTED

Whether incarceration in the Texas Department of Corrections under circumstances presently existing constitutes cruel and unusual punishment as proscribed by the Eighth Amendment to the Constitution of the United States and Article 1, Section 13 of the Constitution of the State of Texas.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

David Nelson,

Petitioner

v.

The State of Texas

Petition for a Writ of Certiorari to the Court of Criminal Appeals Austin, Texas

Petitioner, David Nelson, prays that a writ of certiorari issue to review the judgment denying Petitioner's Motion for Rehearing of the Court of Criminal Appeals for the State of Texas entered on November 21, 1984.

OPINION BELOW

The Court of Criminal Appeals for the State of Texas denied Petitioner's Motion for Rehearing without publishing a written opinion.

JURISDICTIONAL STATEMENT

The Court of Criminal Appeals for the State of Texas denied Petitioner's Motion for Rehearing on November 21, 1984. The jurisdiction of this Court is invoked under 28 U.S.C.A. Rule 17.1(c).

STATUTES INVOLVED

1. U.S.C.A.Const. Amend. 8 provides as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

2. Vernon's Ann.Tex.Const. Art. 1, § 13 provides as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted....

STATEMENT OF THE CASE

Petitioner was indicted for the offense of murder. After two trials, a jury convicted him of the lesser included offense of voluntary manslaughter and assessed his punishment at five years confinement in the Texas Department of Corrections.

The Court of Appeals for the State of Texas affirmed the decision of the trial Court and thereafter the Court of Criminal Appeals for the State of Texas denied Petitioner's Petition for Discretionary Review and Motion for Rehearing.

The question presented to this Court was raised for the first time in Petitioner's Motion for Rehearing and the state court did not render an opinion.

REASON FOR GRANTING THE WRIT

WHETHER INCARCERATION IN THE TEXAS DEPARTMENT OF CORRECTIONS UNDER CIRCUMSTANCES PRESENTLY EXISTING CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT AS PROSCRIBED BY THE EIGHTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE 1, SECTION 13 OF THE CONSTITUTION OF THE STATE OF TEXAS.

Conditions in the Texas Department of Corrections have recently reached a "near riot" and calamitous state.

The Eighth Amendment of the Bill of Rights and Article 1, Section 13 of the Texas Constitution contain identical language: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

The commentary to Vernon's Ann. Tex.Const., Article 1, Section 13 provides

as follows: "[c]ruel and unusual punishments are those of a barbaric character unknown to the law." The proscription has been held to apply to the severity of the punishment as well as to the conditions of incarceration.

The primary concern of the drafters of the Eighth Amendment was to prohibit torture and other "barbarous" methods of punishment. This concept has been expanded by our courts through the years so that the Amendment now also proscribes disproportionate penalties and also deals with what types of conduct constitute crimes. As stated by Justice Marshall in Estelle v. Gamble, 429 U.S. 97, 50 L.Ed.2d 251, 97 S.Ct. 285 (1976):

> The Amendment embodies broad and idealistic concepts of dignity, civilized standards, humanity and decency...against which we must evaluate penal measures. Thus we have held repugnant to the Eighth Amendment punishments which are incompatible with the evolving standards of decency that mark

> the progress of a maturing society...or which involve the unnecessary and wanton infliction of pain....

In that case, the court held that deliberate indifference to a prisoner's serious illness or injury constitutes cruel and unusual punishment as proscribed by the Eighth Amendment.

In Holt v. Sarver, 309 F.Supp. 362 (E.D. Ark., 1970), the court held that the term "cruel and unusual" is flexible and broadens as society cares more for its members (pp. 380-381). The court stated that the conditions in the prisons of Arkansas were such that they were shocking to the conscience of civilized people, and that the claim could be made, and redress sought, by a prisoner although he had not been subject to the particular harm. The court concluded its opinion on page 385 with the following:

> Let there be no mistake in the matter; the obligation of the Respondent to eliminate existing unconstitutionalities does not depend on what the Legislature may do, or upon what the Governor may do, or indeed upon what Respondent may actually be able to accomplish. If Arkansas is going to operate a penitentiary system, it is going to have to be a system countenanced by the Constitution of the United States.

In Morales v. Turman, 364 F.Supp. 166 (ED Tex, 1973), the court issued an injunction against the Texas Youth Council after finding that wide-spread beating, slapping, kicking and otherwise physical abuse of the inmates at a correctional facility constituted cruel and unusual punishment.

Petitioner requests this Court to take judicial notice of the deplorable and shocking conditions by virtue of wide-spread publicity concerning violence, murders, stabbings, and other assaults which have recently occurred at the Texas Department of Corrections.

Copies of articles which have appeared in the Longview Morning Journal and The Dallas Morning News are included in the Appendix (A1-25) and they are just typical examples of the facts concerning the conditions of prisons and the seeming refusal and/or inability of those in control to rectify the situation.

What are the conditions that constitute cruel and unusual punishment in the Texas Department of Corrections today? A January 10, 1985, article in the Longview Morning Journal (A24) stated that the number of stabbings within the system in 1984 was 395 -- over one stabbing each day in the system. This same article reported 25 inmates were slain -- approximately one every other week. To allow such mass stabbings and murdering surely shocks any standard of decency. Petitioner would show the Court that he is not a violent person and has a wife and children who

will be dependent upon him for support. His record to the time of his arrest for the instant offense is spotless. As the court held in Woodhouse v. Virginia, 487 F.2d 889 (CA 4 Va), if there is a pervasive risk of harm to inmates from other prisoners and the officials are not exercising reasonable care to prevent prisoners from intentionally harming others or from creating a unreasonable risk of harm, then cruel and unusual punishment exists and relief should be granted. Such is the case at the Texas Department of Corrections and this Court is the only vehicle by which Petitioner can invoke his constitutional right to be free from cruel and unusual punishment.

Alternatively, if this Court does not take judicial notice of the conditions in the Texas Department of Corrections at the present time, Petitioner requests the Court to remand the case to a lower Court

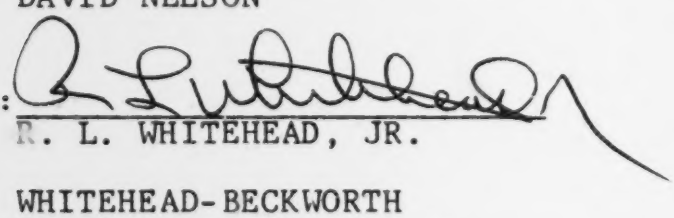
with fact finding capabilities for the purpose of making a factual determination as to the conditions which exist in the Texas Department of Corrections, and whether or not successful remedial measures have been instituted.

CONCLUSION

Conditions in the Texas Department of Corrections are such that it is a deprivation of the constitutional rights of the citizens of the State of Texas and United States of America to confine persons therein. For the reasons stated herein this Court should grant this petition.

Respectfully submitted,

ATTORNEYS FOR PETITIONER
DAVID NELSON

By: 
R. L. WHITEHEAD, JR.

WHITEHEAD-BECKWORTH
505 North Green Street
Longview, Texas 75601
(214) 758-0561

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Petition for a Writ of Certiorari were mailed to the following: Mr. Carter O. Beckworth, District Attorney, Gregg County Courthouse, Longview, Texas; Honorable Robert Huttash, State Prosecuting Attorney, Post Office Box 12405, Austin, Texas 78711; and Solicitor General, Department of Justice, Washington, D.C. 20530 on this 18th day of January, 1985.

R. L. WHITEHEAD, JR.

APPENDIX

Monday, October 14, 1984
Longview Morning Journal

TENNESSEE COLONY (AP) - Mexican American inmates clashed with black prisoners Saturday in violence that left one man dead and seven others injured at the Texas Department of Corrections Coffield Unit, a spokesman said.

The killing was the 19th this year among inmates of the Texas prison system, the nation's second largest.

The eight injured black inmates were stabbed by six Mexican-American inmates about 9:30 a.m. Saturday in what prison officials believe was a racially motivated attack, said TDC spokesman Charles Brown.

Michael Davis, 22, serving a 12-year Bexar County sentence for robbery by threats, robbery by injury, escape and aggravated assault of a police officer, died at Anderson County Memorial Hospital

in Palestine after the early morning assault, Brown said.

Other victims were identified as John Joseph Clark, 24, serving a five-year Tarrant County sentence for aggravated robbery with a deadly weapon, Leon Briscoe, 26, serving an eight-year Jefferson County sentence for burglary and aggravated assault; Roy Sanders, 24, serving a 15-year sentence out of Tarrant County for murder and two counts of attempted murder with a deadly weapon; and Eric Tituef, 22, serving a 15-year Lubbock County sentence for rape.

Clark, Briscoe, Sanders and Tituef were among the more seriously injured, Brown said, and were taken to Anderson County Memorial Hospital.

The three other injured inmates were identified as Milton John Vital, Jr., 22, serving an eight-year Galveston County

sentence for robbery; Michael Daly Mitchel, 30, serving a 20-year sentence out of Tarrant County for burglary of a habitation and aggravated rape of a child; and Matthew Fillmore, 31, serving a 20-year Lubbock County sentence for rape.

Vital and Mitchell were transferred to the hospital at nearby Beto II unit, Brown, said, while Fillmore was treated at the Coffield Unit.

Reports of the prisoners' conditions were not available Saturday afternoon, Brown said.

An official at the hospital, who declined to be identified, refused to provide any information on the inmates' conditions.

"The attack occurred in the B-side dining room, " Brown said, "All the participants were kitchen workers. The suspects pulled homemade weapons and stabbed the eight victims."

Six homemade weapons were found in the dining area, Brown said.

Monday, October 15, 1984
Longview Morning Journal

ROSHARON (AP) - An inmate was found stabbed to death Sunday in a shower at the Texas Department of Corrections Darrington Unit, a prison spokesman said, and five others were found to have minor stab wounds in another area of the same prison unit.

TDC spokesman Phil Guthrie said the body of David Paul Alto, 26, was found with 24 stab wounds not long after a disturbance broke out in the unit's main hallway, where five inmates were found to have minor injuries.

Guthrie said the inmates were confined to their cells and extra prison staff brought in to search for concealed weapons. He said the Brazoria County sheriff's department was investigating the

slaying of Alto, who was serving an eight-year burglary sentence from Harris County.

"We don't know at this time if the two incidents were related," Guthrie said.

Meanwhile, prison officials were interrogating inmates Sunday at the TDC's Coffield Unit at Tennessee Colony to learn what triggered a clash between black and Mexican American inmates that left one prisoner dead and seven others injured on Saturday.

The weekend incidents raised to 20 the number of inmates killed so far this year in Texas prisons.

TDC spokesman Charles Brown said officials at the Coffield Unit were interrogating prisoners Sunday to learn more about what appeared to be a racially motivated clash.

The seven injured and one dead inmates, all black, were attacked by six

Mexican-American inmates in a dining room at the unit, Brown said.

"They (officials at Coffield) have controlled the movement of prisoners in the area where the suspects live," said Brown.

Michael Davis, 22, died at Anderson County Memorial Hospital after receiving "multiple stab wounds to the upper chest" during the 9:30 a.m. attack, Brown said.

Davis had been serving a 12-year Bexar County sentence for aggravated assault on a police officer, robbery by threats, robbery by injury and escape.

Other victims were identified as Leon Briscoe, 26, serving an eight-year Jefferson County sentence for burglary and aggravated assault; John Joseph Clark, 24, serving a five-year sentence for aggravated robbery with a deadly weapon out of Tarrant County; Eric Tituef, 22, serving a 15-year Lubbock County sentence for rape;

and Roy Sanders, 24, serving a 15-year sentence out of Tarrant County for murder and two counts of attempted murder with a deadly weapon.

Monday, October 15, 1984
Longview Morning Journal

TENNESSEE COLONY (AP) - Texas Department of Corrections Lt. Randall McFall has completed his first full week of active duty at a prison much changed since he was stabbed last July by a Coffield inmate wielding a homemade knife.

"Mine (stabbing) was why they did what was done here," McFall said. "They hired the bosses we needed and did the shakedown of the prison."

Changes that McFall returned to find included the addition of about 80 correctional officers to the security staff with the promise of more before the end of the year. A series of subsequent lockdowns reduced the rate of inmate stabbings from 15 a month to zero during the month of September.

However, last weekend saw another eruption of violence at the Coffield Unit that left one inmate dead and seven others injured. TDC spokesman Charles Brown said the Saturday morning attack in a dining room by six Mexican-American inmates against six black prisoners appeared racially motivated.

"This comes as a surprise because we've been doing so well lately as far as violent incidents are concerned," Brown said Sunday. "I don't know what prompted this. I don't know what our next move will be."

The search that followed McFall's July 18 stabbing recovered 489 weapons fashioned and hidden by Coffield inmates. More than 340 of those weapons were crude knives of the kind used on McFall.

TDC Director Raymond K. Procunier's move to identify dangerous inmates and separate them from the rest of the prison

population was the improvement that McFall said won the most immediate approval.

"If you separate the hardened from the less hardened, at least you know where you stand when you go in with them," McFall said.

McFall said that all of the action taken by TDC at Coffield were measures he knew would eventually be instated. Still, he said he was surprised that the changes have been made so quickly after the stabbing that nearly cost his life.

No motive has been established in the attack on the 30-year old McFall, than a sergeant, who was supervising the return of inmates to their cells in a protective wing of the unit. Turning to walk away, McFall was confronted by an inmate who had been standing behind him.

"It all happened so quickly that I don't know how to explain what happened," McFall said. "It was weird."

The homemade knife -- known as a "shank" -- plunged into the 11-year TDC veteran's abdomen before he had time to realize the inmate was armed. A 4-inch deep wound cut across McFall's pancreas, liver and stomach.

He pulled the knife out himself, and ran to the prison infirmary.

Wesley Johnson, 21, serving a 10-year sentence for armed robbery, was indicted for attempted murder by an Anderson County grand jury the following week. Trial was set to begin today.

McFall spent the eight days following the attack at Anderson County Memorial Hospital under heavy sedation. Other than a dim recollection of a handshake, McFall said he remembers very little about Gov. Mark White's visit to his hospital room.

"I don't remember a thing the governor said," McFall said. However, White's concern expressed in two letters

to McFall has "meant a little something to me."

Other boosts to McFall's spirits during his seven-week recovery at Baylor Univeristy Medical Center in Dallas was the announcement of his expected promotion to lieutenant, a letter of commendation for bravery from the TDC and "the pretty nurses."

Although he still faces surgery in November, McFall decided to cut short his convalescence leave and return to work just two weeks out of the hospital.

"I'm not really back at work yet," McFall said. "I'm back here killing time and helping out because I got tired of watching those dull soap operas."

Tuesday, October 16, 1984
Longview Morning Journal

HUNTSVILLE (AP) - A warden and 40 Texas prison employees stormed a prison section early Monday under a hail of tear gas, battling inmates for seven minutes and freeing a guard who was held hostage.

Guard Ronald Willmon, 21, was rescued uninjured shortly after 4 a.m., about an hour after he was captured by a group of prisoners classified as particularly dangerous and troublesome, Warden David Myers said.

Four people -- two guards and two inmates -- were injured, officials said.

The battle came after a weekend of violence that left two inmates dead and 12 others injured in two incidents at Texas prisons. Twenty prison inmates have been killed by other prisoners this year.

The prisoners at the Eastham Unit, 35 miles northeast of Huntsville, escaped early Monday by short-circuiting light sockets in their cells, which shut off electricity to the automatic locks on the doors, prison spokesman Phil Guthrie said.

Myers led the assault and said he intended to storm the section from the first reports of a hostage.

"There was never any doubt in my mind," he said. "They had one of my men."

Guthrie said prison guards could not see into the hall where the prisoners were and could not speak to them.

"Where you don't have direct sight or contact, the thing you do is move, Guthrie said. "You don't wait around."

Prisoners made only one demand, asking for a walkie-talkie, Myers said. He said he gave them one but warned it would not work inside the building.

Myers said the inmates broke into a property room and got boards, pieces of chairs and scissors which they used as weapons.

He said "the whole operation took approximately seven minutes."

Guthrie said the hostage incident began when an inmate warned Willmon there was a problem in the area. The guard went to investigate and was captured, he said.

His captors barricaded the hallway's two doors.

Myers said guards forced a door open a crack and fired in three tear gas cannisters. He said it took "a matter of seconds" to clear away benches and lockers the inmates had used to barricade the doors.

Friday, October 19, 1984
Longview Morning Journal

HOUSTON (AP) - Defense attorneys say violence in the Texas prison system has their clients straining to serve time in county jail -- but Harris County's chief prosecutor says he has little sympathy for the inmates' plight.

Defense lawyer Rachel Capote said two clients in the last two weeks have told her they are afraid to go to a state prison unit. Twenty-one inmates have been killed by other prisoners this year and 317 have been stabbed in the Texas Department of Corrections.

Ms. Capote said one of her clients asked a judge to let him serve 60 days in Harris County Jail before turning him over to state prison officials.

Defendants get credit off their prison terms for time served in county jails.

"He said he really didn't want to go to TDC because they're killing people there," she said.

Ms. Capote said she checks each time an inmate is killed to see if he was one of her clients.

"I'm scared each time I send somebody out," she said.

Ms. Capote said she hates even to strike plea bargains which include prison time because of the danger.

Harris County District Attorney John B. Holmes said he is not concerned by defendants' fears.

"I don't think the penitentiary should be pleasant," he said. "If it adds to a deterrent effect, then maybe they won't commit the crime the next time around."

Attorney Brian Coyne said his clients are also afraid.

"Three or four have asked me to use every type of delay I know so they can get most of their time done here in Harris County," Coyne said. "They're begging for any type of delay."

Tuesday, October 23, 1984
The Dallas Morning News

HUNTSVILLE, Texas - Stabbings at the Eastham Unit and Ellis One Unit increased the number of inmate stabbing in the Texas prison system to 319 this year, a Texas Department of Corrections spokesman said Monday.

Inmate Rickey Gage, 28, was stabbed once in the stomach with a 7-inch knife in the Ellis kitchen at 5:30 p.m. Sunday, said Phil Guthrie, spokesman for the Department of Corrections.

Gage, who is serving a life sentence for theft of property and possession of a firearm in Dallas County, was in fair condition Monday at the TDC hospital in Galveston.

Being held as a suspect is inmate kitchen worker Johnny Cabellero, 37. Cabellero is serving 18 years for carrying

a weapon on a licensed premise, robbery and aggravated assault in Caldwell County.

Guthrie said the stabbing apparently followed an attempt by Gage to get Caballero to steal food and give it to him.

James Scott, 23, was stabbed five times in the neck and back in his cell at the Eastham Unit at 6 p.m. Sunday, Guthrie said. Scott, who is serving a 20-year sentence for escape and burglary of a building in Coleman County, was in fair condition Monday at the TDC hospital.

Being held in prehearing detention as a suspect is Scott's former cellmate, James Lane, 21, serving a 35-year sentence for theft of a vehicle and attempted murder from Taylor County.

Scott was stabbed with a metal spoon that had been sharpened and melted into a plastic cigarette lighter, which was used as a handle, Guthrie said. Officials

believe the stabbing followed a disagreement over commissary items, Guthrie said.

Thursday, January 10, 1985
Longview Morning Journal

ROSHARON (AP) - The Texas Department of Corrections on Wednesday recorded its second inmate slaying of the new year with the fatal stabbing of a 25-year-old prisoner at the Ramsey II Unit in Brazoria County.

Monte Lee Morgan, serving a 13-year term from Dallas County for three counts of aggravated robbery, died of multiple stab wounds to the chest and neck, according to Jim Hinton, chief of the Brazoria County Sheriff's Department.

Jeff Lykins, 36, serving 15 years for various crimes, was identified by prison spokesman Charles Brown as the suspect in the case. Lykins was placed in prehearing detention pending the outcome of an investigation, Brown said.

Last year, 25 inmates were slain -- 23 of them by stabbing, in the most violent year ever recorded in the nation's second largest prison system. Some 395 stabbings were reported. At least four stabbings have occurred so far in 1985.

In Wednesday's incident, officers responding to the sounds of the disturbance saw Lykins with a 4½-inch folding knife in his hand, Hinton said.

"The suspect laid the knife on a table and was removed without incident," Hinton said.

Brown said Morgan told officers at the scene that he had stabbed himself.

"However, we are regarding it as a homicide, pending a complete investigation," Brown said.

The incident occurred in the administrative segregation dayroom about 1:30 a.m. Brown said Morgan died about an hour later.

"Both were in administrative segregation because of a prior history of violence and other disciplinary infractions," he said.

Morgan was stabbed three times in the chest, once in the back and another time the neck, Brown said.

Lykins' convictions included burglary of a habitation in Comal County, theft in Nueces County.

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David Nelson,

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Supplemental Appendix to Petition for a Writ of Certiorari to the Court of Criminal Appeals Austin, Texas

R. L. Whitehead, Jr.
Whitehead-Beckworth
505 North Green Street
Longview, Texas 75601
(214) 758-0561

Attorney for Petitioner

THE STATE OF TEXAS
v.
DAVID ANTHONY NELSON,
Defendant

No. 12,641-B

In the 188th Judicial District Court
Gregg County, Texas

September 23, 1981

JUDGMENT

The defendant having been indicted in the above entitled and numbered cause for the felony offense of Murder, and this day this cause being called for trial, the State appeared by her assistant Criminal District Attorney Rob Foster, and the Defendant appeared in person and his counsel R. L. Whitehead, Jr. also being present, and both parties announced ready for trial, the said Defendant in open Court was duly arraigned and pleaded Not Guilty to the charge contained in the indictment herein; thereupon a jury,

to-wit: George A. Pounds and eleven others, was duly selected, impaneled and sworn, who having heard the indictment read, and the Defendant's plea of not guilty thereto, and having heard the evidence submitted, and having been duly charged by the Court, as to their duty to determine the guilt or innocence of the Defendant, and after hearing arguments of counsel, retired in charge of the proper officer to consider of their verdict, and afterward were brought into open Court, by the proper officer, the Defendant and his counsel being present, and in due form of law returned into open Court in the following verdict, which was received by the Court, and is here now entered upon the minutes of the Court, to-wit:

"We, the Jury, find the defendant guilty of Voluntary Manslaughter.

George A. Pounds
Foreman

The Defendant heretofore, at the time of entering his plea herein, having requested in writing that the jury assess the punishment herein and after further evidence being heard by the jury, the Court again charged the jury as provided by law, and the jury after hearing arguments of counsel, retired in charge of the proper officer to consider of their verdict and afterwards was brought into open court by the proper officer, the Defendant and his counsel being present and in due form of law returned into open Court the following verdict, which was received by the Court and is here and now entered upon the minutes of the Court to-wit:

"We the Jury, Having found the defendant guilty as charged, assess his punishment at Five (5) years Confinement in the Texas Department of Corrections.

George A. Pounds
Foreman

It is therefore considered and adjudged by the Court, that the said Defendant is guilty of the felony offense of Voluntary Manslaughter and that the said Defendant committed said offense on the 1st day of November, 1980, as found by the jury, and that he be punished, as has been determined by the jury, by confinement in the Texas Department of Corrections for Five (5) Years, and that the State of Texas do have and recover of the said Defendant all costs in the prosecution expended, for which execution will issue; and that said Defendant is remanded to the Sheriff of Gregg County, to await the further order of the Court herein.

Marcus Vascocu
Judge Presiding

THE STATE OF TEXAS
v.
DAVID ANTHONY NELSON,
Defendant

No. 12,641-B

In the 188th Judicial District Court
Gregg County, Texas

October 5, 1981

SENTENCE

THIS DAY this cause being again called, the State appeared by her Criminal District Attorney, and the Defendant, David Anthony Nelson, appeared in open Court in person, for the purpose of having sentence of the law pronounced in accordance with the verdict and judgment herein rendered and entered against him at a former time; and thereupon the said Defendant, was asked by the Court whether he had anything to say why said sentence should not be pronounced against him, and he answered nothing in bar thereof, and it

appearing to the Court that the Defendant is mentally competent and understanding of the English language, the Court proceeded in the presence of the said Defendant, his counsel R. L. Whitehead, Jr. also being present, to pronounce sentence against him, as follows:

IT IS THE ORDER OF THE COURT, That the said Defendant, who has been adjudged to be guilty of Voluntary Manslaughter and whose punishment has been assessed by the verdict of the jury at confinement in the Texas Department of Corrections, for Five (5) Years be delivered by the Sheriff of Gregg County, Texas, immediately, to the Director of the Texas Department of Corrections, or other person legally authorized to receive such convicts, and said Defendant shall be confined in said Texas Department of Corrections for Five (5) Years in accordance with the provisions of the law governing the Texas

Department of Corrections of said State and the said Defendant is remanded to jail until said Sheriff can obey the direction of this sentence.

It is further ADJUDGED and DECREED by this Court that the sentence pronounced herein shall begin this date, and that the Defendant is _____.

Marcus Vascocu
Judge Presiding

DAVID ANTHONY NELSON,
Appellant
v.
THE STATE OF TEXAS,
Appellee

No. 12-81-0219-CR

In the Court of Appeals
Twelfth Supreme Judicial District
Tyler, Texas

February 29, 1984

Nelson was indicted for the offense of murder and was first tried on that indictment during the week of April 27, 1981. A jury found him guilty of the lesser included offense of voluntary manslaughter in the first trial and assessed his punishment at eleven years' confinement. Sentence was pronounced in May 1981. On June 19, 1981, the trial court granted Nelson's amended motion for new trial. In the second trial the trial court submitted to the jury the offenses of voluntary manslaughter, involuntary

BES

manslaughter and criminally negligent homicide. The jury convicted Nelson of voluntary manslaughter and assessed his punishment at five years confinement. He urges six grounds of error claiming the trial court erred: (1) in failing to instruct the jury regarding exculpatory statements contained in his written statement which was introduced by the State; (3) in failing to charge on the law of circumstantial evidence; (4) in failing to grant his motion for change of venue; (5) in permitting the State to introduce only portions of his written statement; and (6) in receiving certain photographs into evidence. Nelson also contends by his second ground of error that the State failed to disprove certain exculpatory statements contained in his written confession beyond a reasonable doubt. We affirm.

T AVAILABLE COPY

The evidence shows that on the 31st day of October, 1980 (Halloween night), the deceased, Kevin Yarborough, and ten other youths were riding in a pickup truck owned and driven by Jeff Adams. Two of the youths were riding in the cab with Adams and the remaining eight were riding in the bed of the pickup. Yarborough was seated on the left rear wheel well inside the bed of the truck. The other seven youths were in various locations inside the truck bed. Collectively, the boys had acquired ten dozen cans of raw biscuit dough and some balloons which were filled with water, and were riding about throwing the dough and water balloons at passing vehicles. Shortly before the shot was fired by Nelson causing the death of Yarborough, according to the testimony of Adams and two of the passengers, Reese Walhof and Craig Hogan (State's witnesses), several biscuits had been thrown

at and struck a "little red truck" as it approached from the opposite direction. Adams, Walhof and Hogan all testified that they heard the "thud" as the biscuits struck the red truck. Each of these witnesses also testified that the little red truck made a "U" turn behind them and began following their vehicle. The record reflects that a short time later when Adams' truck, traveling in an easterly direction on Helene Street approached the intersection of Cook Lane and Helene in Longview, the red truck was stopped at a stop sign on Cook Lane at the intersection. Adams, Walhof and Hogan all testified that Adams turned his truck to the right (south) on Cook Lane and was proceeding down the street when the shot was fired. Adams testified that he looked in his rear view mirror, saw the "...flare come oft the pistol..." from the "driver's side." Walhof testified that shortly

after the biscuits were thrown striking the red truck, he saw the truck turn around and follow Adams' vehicle. Walhof's testimony was virtually identical with Adams' testimony respecting the sequence of events at the time of and just prior to the shooting. Walhof also testified that he saw the "gun" come out of the driver's window and fire at a time when the Adams' vehicle was approximately sixty yards distance from the red truck. The evidence shows that the Adams' truck turned right on Cook Lane and was headed south which was the same direction the Nelson truck was facing at the intersection where the stop sign was located.

Shortly after the shooting, some of the boys riding in the bed of the pickup truck noticed that Yarborough was lying down and motionless. Subsequently Yarborough was taken by ambulance to the emergency room of Good Shephered Hospital in Longview where he died from his wounds.

During the course of the investigation of the homicide, certain officers by pure coincidence observed a small red pickup truck matching the description of the "little red truck" given by some of the boys who were passengers in Adams' truck on October 31, 1980. Detective Lieutenant Travis Puckett, District Attorney Odis R. Hill and his criminal investigator, Frank Odom, recorded the license number (RL 7254) of the truck. A check of the truck's registration revealed the owner to be David Nelson of Gilmer. Meanwhile, Puckett who examined the body of the victim at the hospital, found and recovered a spent bullet from between the clothing and body. This bullet was introduced into evidence at trial and was identified by expert testimony as a "nine millimeter bullet." Thereafter, Puckett and other officers interviewed Nelson at his home near Gilmer on November 18, 1980.

Nelson denied any knowledge of the shooting and told the officers that he went to a party on Halloween night and left the party at about 2:00 a.m. on November 1, 1980. The evidence does not establish the precise time of the shooting, but shows that it occurred sometime before 12:25 a.m. on November 1, 1980. Nelson during the interview, however, did admit that he owned a 9 millimeter pistol, and at the request of the investigating officers, gave them the pistol and some live cartridges. The pistol was introduced into evidence at trial by the State. Ballistic test results obtained by the officers were inconclusive to establish that the fatal shot was fired from Nelson's handgun. The red truck owned by Nelson was described by Puckett at trial as a "small type red pickup equipped with a pipe-type rack" and a "headache" rack with bars extends up above the cab.

On November 20, 1980, Nelson was arrested and charged with the murder of Yarborough. Following his arrest, and on the same day Nelson gave a written statement[1] to Odom. Although the State contends that it did not introduce certain portions of the statement, the record demonstrates that the State did offer, and that the trial court admitted on the State's offer the entire statement. (R. II-514 1-2, 3)

As earlier noted, Nelson contends that the trial court erred in refusing to instruct the jury that since the State introduced Nelson's statement, the State was bound by any exculpatory statements contained therein unless the same were disproved by the State by other evidence beyond a reasonable doubt.

Nelson contends the phrase, "there was a bunch of them in the truck, so I figured I would shoot out the tire.", was

exculpatory as to voluntary manslaughter, the offense of which he was convicted. It is a well-settled rule of law in this state that where a defendant makes an oral or written admission of guilt which is introduced into evidence by the State and which admission contains exculpatory matters, the State is bound by the exculpatory declarations contained therein, unless it disproves them beyond a reasonable doubt; moreover, the trial court in such instances is duty bound to clearly and positively so charge the jury. Wooley v. State, 162 Tex. Crim. 378, 285 S.W.2d 219 (1955); Robidoux v. State, 116 Tex. Crim. 432, 34 S.W.2d 863 (1931). However, before the so-called general rule requiring instruction on exculpatory statements made by defendant becomes applicable, the statement of the defendant must amount to an admission or confession of guilt. Nelson's statement contains no

admission of his guilt. Nowhere in the statement is found any admission by Nelson that he shot any person. Under these facts, the rule may not be invoked. Palafox v. State, 608 S.W.2d 177 (Tex. Cr. App. 1980), and cases therein cited at page 181. Ground 1 is overruled. Because of our ruling on Ground No. 1, Nelson's second ground of error contending that the State failed to disprove Nelson's "exculpatory statements beyond a reasonable doubt" is also overruled.

Ground of Error 3 under which Nelson complains of the trial court's failure to charge the jury on the law of circumstantial evidence has no merit. The charge was not required and in fact it would have been improper. Hankins v. State, 646 S.W.2d 191, 197-199 (Tex. Cr. App. on Rehearing 1983).

On July 16, 1981, Nelson filed and urged a motion for change of venue alleg-

ing the existence of "...so great a prejudice against him that he cannot obtain a fair and impartial trial in Gregg County." The motion was duly controverted by the State, and hence the issues so joined were triable by the trial court. Art. 31.04, Tex. Crim. Proc. Code Ann.; McManus v. State, 591 S.W.2d 505 (Tex. Cr. App. 1979). The trial court overruled his motion and Nelson complains of such ruling under his fourth ground of error. In support of this ground Nelson in his brief refers to certain evidence presented at a pretrial hearing on his motion for change of venue conducted on the 5th day of August, 1981. Particularly, Nelson refers to the testimony of witnesses and exhibits of news stories. The record of that hearing is not a part of this record on appeal. Although Nelson requested that the trial court take judicial notice of that proceeding, the record reveals that

the trial court overruled his motion for change of venue without ruling on Nelson's request. Under such circumstances, of course, we will disregard the references in Nelson's brief relating to the evidence adduced at the hearing conducted by the trial court on August 5, 1981.

The record does reflect that at the time of the trial Gregg County had a population in excess of 100,000 and approximately 48,000 qualified jurors. Sixty-two jurors made up the panel from which the jury was selected in this case; and only eleven of those were excused by the trial court on challenges for cause. The individual voir dire examinations of the prospective jurors demonstrates that virtually all the jurors had read or heard about the case from newspaper articles, radio broadcast or telecasts, and a few had otherwise heard the case discussed. Almost all of the jurors were aware of the

first trial, Nelson's conviction and the fact that Nelson did receive a new trial.

Nelson argues that because the facts elicited from the prospective jurors show that at least fifty-nine of them were aware of the murder and the prior trial, that he could not receive a fair and impartial trial. He correctly states that he was denied five additional peremptory challenges but does not indentify any juror who served on the jury that convicted him who was objectionable to him. Nelson does not complain in this appeal of the court's action in overruling a challenge for cause made by him of any prospective juror. Indeed the record does not reveal that he objected to any such action if it occurred.

Our analysis of the evidence presented to the trial court during the voir dire examination of the individual jurors indirectly indicates that the case

was the subject of fairly wide spread publicity. There is no evidence, however, that any of the news media stories were inflammatory or inaccurate. The mere fact that most of the prospective jurors had previously been informed of the murder of Kevin Yarborough and of the fact that Nelson was accused of the homicide and had been tried and convicted and granted a new trial, standing alone is insufficient to mandate the granting on Nelson's motion for change of venue. Adami v. State, 524 S.W.2d 693 (Tex. Cr. App. 1975); Eckert v. State, 623 S.W.2d 359, 363-64 (Tex. Cr. App. 1981). We hold that the trial court did not abuse its discretion in overruling Nelson's motion. Demouchette v. State, 591 S.W.2d 488, 490 (Tex. Cr. App. 1979). His fourth ground is overruled.

Nelson's fifth ground of error complains of the trial court's action in permitting the State to introduce "por-

tions" of his statement. As already noted, the State introduced the entire statement but read only portions of the statement to the jury. Thus Nelson's contentions are unsupported by the facts. In any event no error is shown. Art. 38.24, Tex. Crim. Proc. Code Ann.; Harrington v. State, 547 S.W.2d 616, 621 (Tex. Cr. App. 1977). Nelson's fifth ground is overruled.

Finally, Nelson contends that the trial court erred in admitting into evidence certain photographs introduced by the State. (State's Exhibit Nos. 15-20) These exhibits were photographs of the truck in which the victim was riding on the night of the shooting, and were taken by the State during a reconstruction of the crime scene during daylight hours. The jury was informed that the photographs were taken in daylight as opposed to night time at the time the pictures were of-

fered. We hold that this discrepancy affects only the weight and not the admissibility of the exhibits. And we further conclude that the jury was not misled. Ground six is overruled. The judgment of the trial court is affirmed.

(This opinion is not to be published. Rule 207(a), Rules of Post Trial and Appellate Procedure in Criminal Cases.)

FOOTNOTE

1. Omitting the formal parts the statement reads as follows:
Left home, went over to Mike Tolivers on Friday Oct. 31, 1980. We drank some beer and watch T.V. We talk about jumping and going deer hunting. A fly landed on the wall. Mike Toliver said shoot it. I said no. He kept saying go ahead. So I shot at it. I was starting to hurt bad so I took a pain pill. Because the day before I went to the doctor and had a vasectomy. We left and went the store to buy more beer. When we got back I saw it was getting late. So I left for home. It was around 11:30 or 15 til 12. As I was driving down the road. A vehicle was in my lane. I went down down in the ditch. Then I heard a loud hit. I turned around. And turned down a road. There was a bunch of them in the truck so I figured I would shoot out the tire. I have a telephone in my truck. So when they stop I was going to call the police. They didn't stop. So I went on home. Before I went home I did attempt to shoot out the tire of the truck.

DAVID ANTHONY NELSON,
Appellant
v.
THE STATE OF TEXAS,
Appellee

No. 0406-84

In the Court of Criminal Appeals
Austin, Texas

October 10, 1984

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

DAVID ANTHONY NELSON,
Appellant
v.
THE STATE OF TEXAS,
Appellee

No. 0406-84

In the Court of Criminal Appeals
Austin, Texas

November 21, 1984

On this day, the Appellant's Motion for Rehearing has been DENIED.

DAVID ANTHONY NELSON,
Appellant
v.
THE STATE OF TEXAS,
Appellee

No. 0406-84

In the Court of Appeals
Twelfth Supreme Judicial District
Tyler, Texas

December 20, 1984

The motion of David Nelson to stay the issuance of mandate in the above cause having been duly considered, it is ORDERED that said motion be, and the same is hereby GRANTED, and the Clerk of this Court is directed to stay the issuance of said Mandate until thirty (30) days from the date hereof, being January 21, 1985.

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